SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 293

320 US #4
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A. F. BROOKS, DOING BUSINESS AS EAST SIDE ICE AND FUEL COMPANY, JAMES BROOKS, WILLIAM FRED HAYES AND MAGGIE MAY HAYES, CURTIS PALMER AND ROBERT HOOPS,

Petitioners,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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The petitioners, A. F. Brooks, doing business as East Side Ice and Fuel Company, James Brooks, William Fred Hayes and Maggie May Hayes, Curtis Palmer and Robert Hoops, pray that a writ of certiorari issue to review the opinion of the United States Circuit Court of Appeals entered in the above cause on July 6, 1943, reversing the judgment of the District Court of the United States for the Southwestern District of Missouri.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is found on pages 233 to 242 of the record filed herewith. The opinion of the District Court (R. 77-82) is reported in 43 F. Supp. 870.

Jurisdiction.

The opinion sought to be reviewed was entered on July 6, 1943 (R. 233). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. (28 U. S. C. #347).

Questions Presented.

The Missouri cases of *Daub* v. *Maryland Casualty Co.*, 148 S. W. (2d) 58 and *State ex rel.* v. *Hughes*, 349 Mo. 1139, 164 S. W. (2d) 274 declared the Missouri law to be that under an exclusion clause of an insurance contract exempting from coverage the employees of the insured, the term employees, as used in the policy, did not include casual, temporary or incidental employees; that the word employee is commonly used as signifying continuous service, or as designating a person who gives his whole time and service to another for a financial consideration, or as designating a person who performs services for another for a financial consideration, exclusive of casual employment, or a person in constant and continuous service, or a person having some permanent employment or position, or a person who renders regular and continued services not limited to a particular transaction, or a person having a fixed tenure or position.

The questions are:

1. Should the Circuit Court of Appeals follow this rule or can the Circuit Court of Appeals reverse an opinion of the District Court, which follows the Missouri rule, and in its

opinion establish a new and different definition of the term employee, unsupported by authority, and directly in conflict with the controlling Missouri decision.

2. Should the Circuit Court of Appeals apply the rules of law laid down by the Missouri controlling decisions, in determining whether or not a person is an employee, or can the Circuit Court of Appeals disregard these rules and escape the binding effect thereof, by distinguishing the facts, and then pronouncing a new, different and conflicting general rule.

3. In interpreting an insurance contract, should the Circuit Court of Appeals follow controlling Missouri decisions defining 'employee' and 'casual' as such words are used in insurance policies or can it disregard such decisions and follow cases interpreting the statutory definition of 'casual' as contained in the Missouri Workmen's Compensation Act, when such opinions conflict and are based on entirely different underlying rules of law.

4. When the judgment of the District Court was based upon facts found especially after the court had heard controverted testimony and weighed its credibility, could the Circuit Court of Appeals reverse this judgment for the reason that it would have reached a conclusion at variance with that of the trial court?

Statement.

The State Farm Mutual Automobile Insurance Company brought an action for a declaratory judgment in the District Court against one of its policyholders and persons claiming under him. The suit was authorized by Section 274 (d) of the Judicial Code as amended (28 U. S. C. #400). Jurisdiction of the court was invoked because of diversity of citizenship between the parties.

The insurance company sought a declaration of nonliability under the following exclusionary clause of its policy:

> "This policy shall not apply * * *
>
> Under Coverage A, to bodily injury or to death of any employee of the insured while engaged in the business other than domestic employment of the insured, or while engaged in the operation, maintenance or repair of the automobile, or to any obligations for which the insured may be held liable under any workmen's compensation law, or to the insured or any member of the family of the insured." (R. 136).

Under this clause the insurance company sought to be relieved from its obligation to defend its insured, A. F. Brooks, and his son James Brooks, an additional insured under the policy, in suits brought against them in the State court by William Fred Hayes and Maggie May Hayes, the parents of Raymond Hayes, a sixteen year old boy who had been killed in an accident involving operation of the insured truck, and by Curtis Palmer, another sixteen year old boy who had been injured in the same accident and who had brought suit through his next friend, Robert Hoops. The insurance company further sought relief from its obligation to pay on behalf of the insured a judgment for the sum of $3,000.00 which William Fred Hayes and Maggie May Hayes had obtained against the insured in the State court as a result of their suit. The suit of Curtis Palmer was pending in the State court at the time of the trial in the District Court.

The trial was to the Court. The facts found by the court, sitting as a jury, in which the Circuit Court of Appeals concurred were: the policyholder was engaged in operating among other things a fuel yard at Joplin, Missouri; it was part of such operation to obtain wood from points outside Joplin; late in August and early in September,

1941, Raymond Hayes and Curtis Palmer, both sixteen years of age, accepted temporary employment at a place where the insured was obtaining wood by sawing a pile of slabs which had accumulated around a sawmill; they were hired to collect the wood and pile it for loading and transportation to Joplin in the truck insured under the policy; on September 3, 1941, and while the policy was in force, they were riding to Joplin on the loaded truck when an accident occurred which resulted in the death of Raymond Hayes and the injury of Curtis Palmer (R. 237).

From its opinion, the Circuit Court of Appeals apparently refused to concur in the finding entered by the trial court as follows:

> "At the time of the accident the said Raymond Hayes and Curtis Palmer were not engaged in the performance of the duties for which they were employed by the said A. F. Brooks, but were riding in the truck under an arrangement that they would be taken to and returned from the place of employment in the assured's truck" (R. 236).

The Circuit Court of Appeals found a discrepancy between the finding entered by the court and a requested finding of fact filed by the respondent which recited:

> "Raymond Hayes and Curtis Palmer, while in the employ of said A. F. Brooks and while engaged in the business of said A. F. Brooks were riding in the automobile truck * * *" (R. 237).

Refusing to accept the interpretation of this ambiguity which would support the judgment, the Circuit Court of Appeals held that although the boys were passive in riding on the truck, this ride was clearly within their employment in the business of the insured (R. 233).

The Circuit Court of Appeals reversed the judgment of the District Court on three of the above mentioned "Re-

quested Findings of Fact" which were filed by the respondent long after the trial court had entered its memorandum opinion (R. 77-82) and findings of fact and conclusion of law (R. 50-52). In arriving at its decision the Circuit Court of Appeals culled these three findings of fact out of a series, part of which the trial court had marked "given" and part "refused", and a series of conclusions of law submitted by the respondent, all of which the trial court had marked "refused" (R. 52-58). The three findings thus set apart by the Circuit Court of Appeals were substituted as so-called "facts found specially" for finding of fact 4, entered by the trial court as follows:

> "The alleged employment of Raymond Hayes and Curtis Palmer should be described by the words 'occasional, incidental or casual employment'. Admittedly, it was not regular or continuous employment. Both the employer and the employees, as well as the plaintiff, understood that" (R. 51).

From its assembled findings of fact the Circuit Court of Appeals arrived at a decision that the conclusion of the trial court was erroneous, and substituted its own conclusions that the employment of the two boys was not casual employment and that the claims asserted against the insured were not as a matter of law within the coverage of the policy and that the respondent was entitled to a declaratory judgment to that effect.

The Circuit Court of Appeals refused to accept Finding of Fact 4 entered by the trial court because it was "conclusion of law or of mixed law and fact." The language used by the court is a quotation from the description of "casual employment" found in the case of *Daub* v. *Maryland Casualty Company* (Mo. App.), 148 S. W. (2d) 58. In that case, the St. Louis Court of Appeals held that the word "employee" as used in insurance policies is ambiguous and generally denotes regular employment. The Dis-

trict Court concluded from the evidence that the two boys in the instant case were not employees of the insured within the purview of the policy under the decision in *Daub* v. *Maryland Casualty Company* and cases cited therein, and rendered judgment for the insured for attorney fees and expenses of the defense of the suits, and judgment obtained against the insured in the state court. Jurisdiction of the case was retained by the trial court for purpose of adjudication of the rights of Curtis Palmer against the respondent, and of other questions upon which the court reserved judgment.

The only issue in the case is whether or not the two boys were employees of the insured within the meaning of the policy. The record sustains the trial court's description of the employment of Raymond Hayes and Curtis Palmer, as occasional, incidental or casual employees, and clearly is against the conclusion of the Circuit Court of Appeals that the boys were employees in the regular business of the insured.

In the opening statement of counsel for the respondent, a distinction was drawn between Blackburn Stout, the regular yard man, and the two young men who were hired for the single transaction of bringing wood to the saw on the particular job at the slab pile (R. 90, 91).

The evidence showed that Raymond Hayes had gone to Brooks' place of business on the night of Saturday, August 30, 1941, seeking employment. He helped unload a load of wood that night and was paid twenty-five cents. He was that night engaged by Brooks to work for the duration of the job of sawing up the slap pile, a period of five or six days. His duties were to bring wood to the saw at the place where the sawing was being done (R. 131). The work commenced when he got to the slab pile and ceased when the saw stopped (R. 131). He was not one of the persons continuously employed, as was James Brooks (R.

119) and Blackburn Stout (R. 132), but was an extra worker hired for this particular job (R. 132).

On Sunday, August 31, he rode to the slab pile with Brooks and another boy and went swimming, and was not paid (R. 115). On Monday, September 1, he worked at the slab pile and rode home to Joplin on the loaded truck. He did not unload the truck (R. 115, 117, 118). On Tuesday, September 2, they did not go to the slab pile. Raymond Hayes did chores at the yard sorting cook wood from a pile of slabs. On Wednesday, September 3, he worked at the saw and was killed while riding home on the loaded truck (R. 119, 120). He was hired only for the duration of the job, because he wanted to earn $5.00 by Saturday night (R. 90, 131).

Curtis Palmer had done chores around Brooks' place of business, such as raking off the yard, when he wanted to earn twenty-five or fifty cents (R. 176). He had never worked steadily (R. 177). He worked at the slab pile carrying wood to the saw on Saturday, August 30, 1941 (R. 174). He did not work on the following Monday or Tuesday, but did work on Wednesday, the day of the accident (R. 177).

Both boys were to be paid $1.00 per day for their wages, although Brooks had paid as high as $2.00 per day (R. 122). His crews sometimes consisted only of Brooks' regular employees, and sometimes extra help which Brooks picked up in the vicinity of the particular sawmill where he had happened to purchase a slab pile. On some occasions he brought help from Joplin to the sawmill (R. 112). The rides to and from the slab piles on the truck which was used for transporting loads of wood formed no part of the consideration for the work, and it would have made no difference in their pay if the boys had not been given the rides (R. 168).

Whether it be termed a conclusion of law, or a finding of ultimate fact, the description applied by the trial court to the employment of the two boys is sustained by the record, and the conclusion of the trial court reached therefrom is founded upon applicable local decisions.

Specifications of Error to Be Urged.

The Circuit Court of Appeals erred:

1. In holding that:

> "It is recognized that generally the insured and all the persons working for him for wages in his business are excluded from the insurance. A cardinal object of the insurance is to distinguish between the public and those engaged in the business and to include the latter and to exclude the former."

in conflict with the case of *Daub* v. *Maryland Casualty Company*, 148 S. W. (2d) 58, l. c. 59-60 (certiorari quashed *State* v. *Hughes et al.*, 349 Mo. 1139), in which the St. Louis Court of Appeals holds:

> "The words, employed and employee, as used in insurance policies, generally denote regular employment as distinguished from occasional, incidental or casual employment. It is in this sense, we think, that the word 'employed' is used in the policy with which we are here concerned. The obvious purpose of the restrictive words 'not employed' is to exclude from coverage any person regularly employed, or in other words, any regular employee, not a mere occasional, incidental or casual employee".

and which the Circuit Court of Appeals was bound to follow.

2. In holding that the employment of Raymond Hayes and Curtis Palmer was not casual, under decisions interpreting the Missouri Workmen's Compensation Act.

3. In holding that the rides in the insured truck to and from the place where the two boys were working was part of their employment in the regular business of the insured, under decisions interpreting the Missouri Workmen's Compensation Act.

4. In holding that on the facts found specially the claims asserted were not as a matter of law within the coverage of the policy and that the plaintiff was entitled to a declaratory judgment to that effect.

Reasons for Granting the Writ.

1. This case was tried by the District Court and presented to the Circuit Court of Appeals on the theory that the policy of insurance was a Missouri contract, and that in an action for a declaratory judgment interpreting the provisions of the policy, where jurisdiction is founded on diversity of citizenship, the Federal Courts are bound by applicable decisions of the intermediate courts of Missouri in the absence of convincing evidence that the highest court of the state would decide differently. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817; *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, 58 S. Ct. 860; *Rosenthal* v. *New York Life Insurance Co.*, 304 U. S. 263, 58 S. Ct. 874; *Stoner* v. *New York Life Insurance Co.*, 311 U. S. 464, 61 S. Ct. 336, l. c. 338. The opinion of the Circuit Court of Appeals, declaring a new "general rule", without benefit of authority, reversing the judgment of the District Court, founded on local decisions, with which the opinion of the *of the* Circuit Court of Appeals is in conflict, is subject to review by this Court. Under the above cited decisions of this Court, the judgment of the District Court should be affirmed.

2. The controversy in this case centered upon the issue of whether or not the two boys who were injured, one of

them fatally, were employees of the respondent's insured within the purview of the policy. The District Court found that the boys were casual employees, under the definition of casual employment announced by the St. Louis Court of Appeals in *Daub* v. *Maryland Casualty Company*, 148 S. W. (2d) 58, and cases cited therein. The opinion of the Circuit Court of Appeals is in conflict with the decision of the St. Louis Court of Appeals in the *Daub* case, and is also in conflict with the decision of the Supreme Court of Missouri, quashing certiorari in *Daub* v. *Maryland Casualty Company*, reported in *State* v. *Hughes, et al.*, 349 Mo. 1139, 164 S. W. (2d) 274.

The facts in *Daub* v. *Maryland Casualty Company, supra*, were that a sixteen year old boy was injured while doing chores about a dwelling house of an insured under a public liability similar to the policy in the instant case. The St. Louis Court of Appeals held that the word "employee" as used in an exclusionary clause of the policy was ambiguous, and should be given the construction most favorable to the insured.

In construing the policy, the court held that the word employee "is commonly used as signifying continuous service, or as designating a person who gives his whole time and service to another for a financial consideration, or as designating a person who performs services for another for a financial consideration, exclusive of casual employment, or a person in constant and continuous service, or a person having some permanent employment or position, or a person who renders regular and continued services not limited to a particular transaction, or a person having a fixed tenure or position".

The trial court applied this test to the employment of Raymond Hayes and Curtis Palmer and held that the employment of the two boys by the insured should be characterized as "occasional, incidental, or casual employment."

The opinion of the Circuit Court of Appeals attempts to distinguish the instant case from the facts of the *Daub* case by holding that the boys in the instant case were engaged in the business of the insured, while the boy in the *Daub* case was working at chores on the premises of the insured. This opinion is not sustained by the record. The employment of Curtis Palmer consisted of nothing more than doing chores and odd jobs about the premises of the insured at irregular intervals. Raymond Hayes was doing nothing more than occasional work, which the Court of Appeals concedes might be called incidental to the business of the insured. This line of reasoning not only fails in the face of the record, but is in conflict with the decision of the Kansas City Court of Appeals in *Eisen* v. *John Hancock Mutual Life Insurance Company*, 91 S. W. (2d) 81, l. c. 87. (Cited in the *Daub* case), which holds that an occasional worker in a department store, not being regularly employed, did not continue to be an employee within the meaning of a group insurance policy.

The opinion of the Circuit Court of Appeals, which would limit the scope of the *Daub* case to boys doing chores around dwelling houses, is clearly in conflict with the applicable Missouri decision of that case, and should be reviewed by this Court.

3. The District Court followed the definition of casual employment prescribed by the Missouri Courts for interpretation of insurance policies. The opinion of the Circuit Court of Appeals reversing the judgment of the District Court on this point, is founded on definitions of casual employment under the Missouri Workmen's Compensation Act, which are not applicable to the instant case.

This Court has held in the case of *United States* v. *American Trucking Assn's*, 310 U. S. 534, 60 S. Ct. 1059, 1065 that the word employee is not a word of art. It takes color from

its surroundings and frequently is carefully defined by the statute where it appears.

The Missouri Workmen's Compensation Act defines casual employment as follows:

> "Sec. 3695 (d) An employee who is employed by the same employer for more than five and one-half consecutive work days shall for the purpose of this chapter be considered a regular and not a casual employee (R. S. Mo. 1939)."

Since the employment in this case was not consecutive and would have ended for both boys in less than five and one-half days work, the employment would, under the definition of the statute, be casual employment. However, avoiding the statute, the Circuit Court of Appeals held that the employment was not casual under three Missouri decisions interpreting the Act, none of which are applicable under the law or facts to the instant case.

In each of the cases cited by the Circuit Court of Appeals, *Sonnenberg* v. *Berg's Market*, 227 Mo. App. 391, 55 S. W. (2d) 494; *March* v. *Bernardin*, 229 Mo. App. 246, 76 S. W. (2d) 706 and *Carrigan* v. *Western Radio Company*, 226 Mo. App. 468, 44 S. W. (2d) 245, the opinions take great pains to point out that they only seek to determine the intention of the legislature in making the statutory definition. With much care, these opinions differentiate between the terms "casual employee" and "casual employment", and hold that it was the intention of the legislature that the status of the employee be determined by the nature of the work he was doing and not by the terms of his employment. Had the *Daub* case held that persons engaged in regular employment for the insured were excluded then these opinions might have some value. But the *Daub* case holds that the obvious purpose of the restrictive words was to exclude those regularly employed as distinguished from those engaged in regular employment.

The cases relied on by the Circuit Court of appeals go so far as to hold that even though the employee may not be a regular employee, and is a casual employee, that if the work he is doing is regular, then he is under the Act.

The Daub case clearly makes this distinction in its deciding paragraph where it says:

> "It is clear that Winton Meyer, at the time of his injury, was not regularly employed by plaintiffs, or a regular employee of plaintiffs, and he is therefore not excluded from the coverage of the policy."

Nor are these decisions applicable to the instant case for the reason that they are interpretations of an exclusive statute, which does not add to our supplement the common law, but is substitutiontial in character. *New Amsterdam Casualty Co.* v. *Boaz, Kiel Const. Co.* (C. C. A. 8), 115 F. (2d) 950. *Elihinger* v. *Wolf House Furnishing Co.* 230 Mo. App. 648, 72 S. W. (2d) 144; *Smith* v. *Kiel* (Mo. App.), 115 S. W. (2d) 38. The word "Casual" as used in the act, does not refer to the employing of the particular employee, but to the employment or work the employees is engaged to do. *Tokash* v. *General Baking Co.*, 349 Mo. 767, 163 S. W. (2d) 554.

In construing the act, the courts have held that doubtful cases should be resolved in favor of the servant. *Carrigan* v. *Western Radio Co., supra,* and that it should be liberally construed in furtherance of its purpose to provide compensation for all accidental injuries arising out of and in the course of the employment. *Howes* v. *Stark Bros. Nurseries and Orchards Co.*, 223 Mo. App. 793, 22 S. W. (2d) 839.

The Circuit Court of Appeals apparently overlooked these principles in applying the act to the instant case to deprive the employees therein of the coverage of the policy. However, as the decisions cited by the Circuit Court of Appeals interpreting the act, are not applicable to the instant case, the definition of casual employment purported

to have been established by the Circuit Court of Appeals is without authority and the judgment of the trial court should be affirmed.

4. The decision of the Circuit Court of Appeals that the conclusion of the trial court was erroneous because the ride to and from the slab pile was part of the employment of the two boys is likewise based upon Missouri decisions interpreting the Workmen's Compensation Act.

5. The serious and disturbing element in the opinion of the Circuit Court of Appeals is the complete and entire misapprehension of the purpose of the exclusion clause. That this statement of the object of the insurance will cause the utmost confusion is apparent from a comparison of the statement of the Missouri Court with that of the Circuit Court of Apeals.

The Missouri Court says:

> "The obvious purpose of the restrictive words 'not employed' is to exclude from coverage any person regularly employed, or in other words, any regular employee, not a mere occasional, incidental or casual employee."

The Circuit Court of Appeals says:

> "A cardinal object of the insurance is to distinguish between the public and those engaged in the business, and to include the former and to exclude the latter."

Is there a conflict?

To apply the test in the Daub case we ask this question. Was he regularly employed? If not he is covered by the policy. But the Circuit Court of Appeals says, he may not have been regularly employed, yet if he was engaged in the business of the insured, he is not covered.

The wording of the exclusion clause demonstrates the utter fallacy of this interpretation for it excludes "*any employee*" who is "*engaged in the business.*" He must be

first "an employee", and second "engaged in the business". But under the opinion of the Circuit Court of Appeals, whether he be an employee or not is of no consequence and may as well have been omitted from the clause. The object of the insurance could not have been, as the Court of Appeals said, to distinguish between the public and those engaged in the business of the assured or there would have been no reason whatsoever for using the term any employee. The Missouri Courts have perceived the distinction and have followed the correct rule.

The clear result is that in future cases decided in the Missouri Courts—the question to be answered to determine liability is—was he a regular employee, while all litigant insurance companies having diversity of citizenship and in which over $3000 is involved may escape liability in almost all cases by going to Federal Court and having the case decided on the answer to the question, was he engaged in the business of the insured.

It was to prevent the hopeless confusion and injustice arising from such a situation that *Erie* v. *Tompkins* became the law of this land.

6. The purpose of the insurance contract, which governs its interpretations, is clearly to furnish coverage to policyholders from claims of injured employees who are not entitled to the benefits of the Workmen's Compensation Act. Therefore, the opinion of the Circuit Court of Appeals fails to concur with the decisions of the Missouri Courts on this point.

The evidence in the case at bar shows that the insured did not have enough workers to come within the provisions of the Workmen's Compensation Act. Public liability policies of the kind at bar are, in many situations, issued to employers in connection with employer's liability policies applicable to injuries to employees coming under the pro-

visions of the workmen's compensation law. Since the employer's liability policies provide for coverage as to compensation claims, it naturally follows that the public liability policies similar to the policy at bar, provide that they shall not cover such situations; in short, the employer's liability policies afford coverage for situations arising under the workmen's compensation act which supersede common law liability situations, while policies in the nature of the one herein at issue provide for all common law negligence cases resulting from the operation of the insured vehicle.

The Missouri Court in *Daub* v. *Maryland Casualty Company, supra,* took cognizance of this aspect of the insurance policy similar to the one at bar when it cited the case of *Weiss* v. *Employer's Liability Assur. Corp., Ltd.,* 131 Misc. Rep. 301, 226 N. Y. S. 732 in its decision. In that case a boy was engaged by the operator of a motion picture theatre to rewind the reels. He was injured at the theatre and the insurance company which had issued a public liability insurance policy to the theatre company denied liability because its policy insured against injuries suffered by persons "other than employees". In holding that the boy was not an employee within the meaning of the policy, the court said:

> "We think that the word 'employee' as used in an indemnity policy in this state is generally understood to limit the liability of the insurer, so as to exclude claims which would entitle the injured person to compensation under the Workmen's Compensation Law."

If this opinion is permitted to stand, no coverage is available through standard form public liability policies, or workmen's Compensation Policies, to the large group of risks such as the one in this case, until such time as all present standard form policies of public liability and employer's liability policies have been rewritten in accordance

with the holdings of the Circuit Court of Appeals in this case. Manifestly the premiums charged for public liability and employer's liability policies are such as contemplate full coverage. Yet this opinion provides a loophole for insurance companies to escape liability from a risk obviously intended to be covered. The profits accruing to insurance companies through avoidance of these liabilities, constitute unlawful and illgotten gains, and they should not be permitted to so profit as a matter of public policy.

7. There is another matter of grave concern to the courts and to the public in the opinion of the Circuit Court of Appeals. This opinion should be reviewed by this Court for the reason that the Circuit Court of Appeals in setting aside the findings of fact by the District Court and substituting its own conclusion for that of the District Court in reversing the judgment has entered a decision in conflict with the rulings of numerous other Circuit Courts of Appeals under the provisions of Rule 52 (a) of the Rules of Civil Procedure.

Under the provisions of Rule 52 (a), requests for findings are not necessary for purpose of review, and findings of fact entered by the trial court shall not be set aside unless clearly erroneous, giving due regard to the opportunity of the trial court to judge the credibility of the witnesses.

The interpretation of Rule 52 (a) generally followed by the various circuit courts of appeals is that all conflicts in the evidence are presumed to have been resolved in favor of the party for whom the trial court enters judgment, and the findings of the trial court are presumed to be correct. *Lowden* v. *Hansen* (C. C. A. Minn.), 134 F. (2d) 348; *Adam Hat Stores* v. *Lefco* (C. C. A. Pa.), 134 F. (2d) —; *Walling* v. *Rocklin* (C. C. A. Iowa), 132 F. (2d) 3; *Smalls* v. *O'Malley* (C. C. A. Neb.), 127 F. (2d) 410. It is further held that only in cases where susbtantially all of the testimony was in the form of documentary evidence, or depositions, so that the

district court was in no better position than the appellate court to determine the credibility of the evidence, is it permissible for the reviewing court to set aside the findings of the lower court. *Equitable Life Assur. Soc. of U. S.* v. *Irelan* (C. C. A. Mont.), 123 F. (2d) 462; *Himmel Bros. Co.* v. *Serrick Corp.* (C. C. A. Ind.), 122 F. (2d) 740.

In the case of *Gary Theatre Co.* v. *Columbia Pictures Corporation* (C. C. A. 7) 120 F. (2d) 891, the decision of the court clearly states the accepted interpretation of Rule 52 (a). At page 892, the court said:

> "The case was tried without a jury and the court entered special findings of fact as contemplated by Rule 52 (a) * * *. Under Rule 41 (b) the judgment, supported by findings, was an adjudication upon the merits, inasmuch as defendants moved for dismissal upon the ground that, upon the facts and the law, plaintiff had shown no right to relief. Consequently our question is whether the findings are supported by the evidence. Under Rule 52 (a) we cannot set them aside unless they are clearly erroneous, and, by the same token we must give due regard to the opportunity of the trial court to judge the credibility of the witnesses * * *.
>
> "Whether the trial tribunal be jury or judge, the inference to be drawn from the facts and circumstances submitted and whether in any particular case the facts justify the ultimate findings are questions for such tribunal subject to revision for error of law. Where parties may differ as to the correct solution of the factual problem faced, it is the duty of a court of review to refrain from attempting to substitute its findings for those of the trial court. It matters not that we might have arrived at a conclusion at variance with that of the trial court. Where as here the trial tribunal has observed the witnesses and has made voluminous detailed findings supported by substantial evidence, we are unable to say that the situation contemplated by

the rule,—that the findings are clearly erroneous,—is presented. * * *

"To determine the question in favor of plaintiff would necessitate the substitution of our judgment upon the facts for that of the trial court. It would require us to hold either as a matter of law that a conspiracy has been established or that the priority of runs and clearance practiced whereby the plaintiff was placed in the same category as the "B" theatres in South Chicago created as a matter of law an unreasonable restriction in Interstate Commerce. This we do not believe we are justified in doing."

In the instant case, the Circuit Court of Appeals felt itself justified in holding that the trial court's description of the employment of Raymond Hayes and Curtis Palmer was a conclusion of law, and that under what the Circuit Court of Appeals termed were the "facts found specially" the claims asserted against the insured were not, as a matter of law, within the coverage of the policy.

The description of the employment of the two boys might easily under applicable decisions be termed a finding of ultimate facts. *Woldson* v. *Bauman* (C. C. A. Idaho), 132 F. (2d) 622; *Gay Games* v. *Smith* (C. C. A. 7), 132 F. (2d) 930, 932; *Walling* v. *Rocklin* (C. C. A. 8), 132 F. (2d) 3, 6. However, regardless of whether the finding the Circuit Court of Appeals found objectionable was a conclusion of law or a finding of ultimate fact, the record clearly shows that the ruling of the court on a question of local law was correct, and it should not be disturbed on appeal. *Palmer* v. *Hoffman*, 63 S. Ct. 477; *Securities & Exchange Commission* v. *Chenery Corporation*, 63 S. Ct. 454.

The question of whether or not the Circuit Court of Appeals was justified in reversing the judgment of the District Court upon the three "requested findings of fact" submitted by the respondent to the lower court after an opinion and

the court's finding of fact had been entered in the case, should be reviewed by this Court. Examination of these "requested findings of fact" reveals that, stripped of the legal conclusions inserted between the findings of actual fact by the respondent, they are the identical recital of the facts of the case entered by the trial court over its own signature. The Circuit Court of Appeals, obviously misled by the inferences gleaned from this confusion of the issues created by the respondent as its only hope of reversing the judgment of the lower court on appeal, substituted its own conclusion for that of the trial court, disregarding the rule of interpretation that if there is an ambiguity in a finding of fact, the reviewing court must accept the interpretation which supports the judgment. *Maryland Casualty Co.* v. *Stark* (C. C. A. 9), 109 F. (2d) 212, 215.

In view of the conflict in the opinion of the Circuit Court of Appeals with the decisions of the other circuit courts of appeals as above outlined, this court should exercise its powers of supervision by granting certiorari to review the decision of the Circuit Court of Appeals.

Conclusion.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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